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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES T. CARKULIS, PETITIONER

v.

STATE OF MONTANA AND DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, RESPONDENTS

ON APPEAL FROM THE SUPREME COURT OF MONTANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Where an accused sincerely contends that the prosecution will fail to prove a prima facie case, may a legislature or a state court, applying Mont. Code Ann. § 46-15-323 (1987), order the accused to communicate to the prosecutor the names and addresses of persons who might testify, together with their statements, to communicate a list of papers, documents, photographs, and other tangible objects which may be used at trial, and to authenticate documents and things, which he believes may aid the prosecutor's case-in-chief, without violating the accused's privilege against self-incrimination?

II. Montana Code Annotated §46-15-323(4)(c) (1987), requires an accused to make available to the prosecutor "a list of all papers, documents, photographs, and other tangible

objects that he will use at trial." Section 46-15-323(6) authorizes the district court to order any person to make material available to the prosecutor when he demonstrates substantial need for the material, undue hardship in obtaining it, and no violation of the accused's constitutional rights. May a state court, applying this section, order an accused to make available to the prosecutor "all papers, documents, photographs, and other tangible objects" which may be used at trial, when neither the order nor the application particularly describe the items to be seized?

III. May a state court impose sanctions which preclude an accused from offering any rebuttal evidence, where the accused challenges the constitutionality of state criminal discovery statutes?

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JURISDICTIONAL STATEMENT

Appellant James T. Carkulis appeals from the final judgment and order denying rehearing of the Supreme Court of Montana dated November 25, 1987, and January 5, 1988, respectively, holding that Montana's criminal discovery rules, Mont. Code Ann. § 46-15-323 (1987), do not violate his right to be free from unwarranted seizures, his right against self-incrimination, and his right to call witnesses on his own behalf, guaranteed by the fourth, fifth, sixth, and fourteenth amendments of the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of Montana is reported at 746 P.2d 604. The slip opinion is reprinted in the Appendix hereto. The memoranda opinions of the District Court for the Thirteenth Judicial

District of the State of Montana (Baugh, D.J.) are unreported. The district court's order of December 20, 1985, is reprinted in the Appendix, p. 58a, below. The district court's memorandum and order of April 9, 1987, is reprinted in the Appendix, p. 65a, below.

JURISDICTION

Appellant filed a Petition for Writ of Supervisory Control in the Montana Supreme Court on May 4, 1987, challenging the constitutionality of Mont. Code Ann. § 46-15-323 (1987), on its face and as applied. The Montana Supreme Court entered its decision on November 25, 1987, upholding the validity of the statute. Appellant timely moved for rehearing. The motion for rehearing was denied on January 5, 1988. App., p. 78a.

The jurisdiction of this Court to

review the judgment of the Montana Supreme Court is invoked pursuant to 28 U.S.C. § 1257(2).

STATUTES INVOLVED

Amendment IV, United States Constitution (1791)

The right of the people to be secure in their . . . papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . things to be seized.

Amendment V, United States Constitution (1791)

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

Montana Code Annotated §§ 46-15-321 to -329 (1987) App. p. 93a.

STATEMENT OF THE CASE

The Appellant, James T. Carkulis, was charged by information with felony forgery of "lien waivers"[1] on August 7, 1984.

On December 4, 1985, following the enactment of Ch. 202, L. Mont. (1985), Mont. Code Ann. §§46-15-321 to -329 (1987), App., p. 93a, the prosecutor filed a "Motion for Discovery." App., p. 81a. Carkulis objected to the motion on the grounds that the sought-for disclosure would violate his fifth amendment privilege, and violated the protections accorded to him by the fourth amendment. App. p. 84a.

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[1]A lien waiver is a document which purports to limit a supplier's right to file a mechanic's lien against real property. A sample of one alleged waiver is set forth in the Appendix, p. 91a.

On December 20, 1985, the district court granted the prosecutor's motion in part. Carkulis was ordered to give the prosecutor: names and addresses of persons he will call as witnesses; copies of their statements; and all papers, documents, photographs and other tangible objects which Carkulis "will" use as exhibits at trial. App. p. 59a.

On December 11, 1986, the Montana Supreme Court denied Carkulis's petition for relief from the district court's order, finding that the case was not yet ripe for review. App., p. 61a.

Carkulis then moved the district court to reconsider its order. On April 9, 1987, the district court denied that motion and unconditionally ordered Carkulis to produce the materials set out in the December 20, 1985, order "by May 1, 1987, or be precluded from offering the same at trial." App. p. 65a.

On May 4, 1987, Carkulis again petitioned the Montana Supreme Court for a Writ of Supervisory Control.

Carkulis argued that both Mont. Code Ann. § 46-15-323 (1987) and the district court's order violated the fourth amendment, violated his right against self-incrimination, and violated his sixth amendment right to compulsory process. The Montana Supreme Court considered these arguments but upheld the statute:

> In this case, we determine that the reciprocal pretrial discovery statutory provisions in criminal cases, for the purposes of this case, and when applied as herein directed, are amenable to the state and federal constitutions and not barred by the provisions of the state and federal constitutions herein specified.

App. p. 2a.

Throughout these proceedings, Carkulis has asserted in good faith, and today sincerely believes, that the prosecutor will be unable to prove a prima facie case sufficient to survive a motion

to dismiss; Carkulis believes and asserts that information and things within the scope of the statute and the district court's order will aid the prosecutor in resisting that motion and assist the prosecutor in preparing and presenting his case-in-chief.

Carkulis cannot now state in good faith that he will call any witness or use any exhibit. He has asserted that the ordered production exceeds constitutional limitations. Because of thse assertions, Carkulis is now barred from calling witnesses or introducing exhibits in the event that his motion to dismiss is denied. App., p. 65a.

THE QUESTIONS ARE SUBSTANTIAL

The fourth amendment and fifth amendment implications of general discovery rules have never been squarely addressed by this Court. This Court has

decided that pretrial disclosure of alibi witnesses does not violate the right against self-incrimination. Williams v. Florida, 399 U.S. 78 (1970). However, in Williams the accused's alibi witness did not rebut the prosecution's case-in-chief and did not have knowledge about facts of the crime charged.

In Taylor v. Illinois, __ U.S. __, 108 S. Ct. 646 (1988), only the constitutionality of sanctions for flagrant discovery abuses was at issue.

The case at bar directly raises the issues of whether an accused may be compelled to communicate incriminating information to the prosecution as a part of discovery ordered by the legislature and whether the state can avoid the fourth amendment's requirements of an oath and particular description of things to be seized.

The Appellant, James Carkulis, was

charged with forging signatures on lien waivers. Appellant's attorneys have investigated this case. We are convinced that the prosecution will fail to establish a prima facie case and that there is a rebuttal to the State's charges.

But, as was the defendant in Simmons v. United States, 390 U.S. 377 (1968), Carkulis is faced with a dilemma. The rebuttal evidence is, arguably, additional proof of guilt and is likely to lead to additional prosecution evidence. By preparing and communicating lists of witnesses and documents, who know or which contain incriminating evidence, the accused will improve both the prosecutor's case-in-chief and his odds of overcoming a motion to dismiss. As a result of the Court's application of §46-15-323, Carkulis has been compelled to surrender his right to conduct a defense in order to

assert his fifth amendment privilege against self-incrimination and his right to be free from general warrants.

Thus, the first question is squarely presented to this Court: may a state compel an accused to provide the prosecution with information which will aid it in proving its case?

For over three hundred years, an accused has been free from such compulsion. Levy, L., Origins of the Fifth Amendment, 301-09 (2d Ed. 1986). An accused's (and a witness's) right to remain silent, to refuse to identify favorable or unfavorable witnesses or to refuse to identify physical evidence, whether exculpatory or inculpatory, is unquestioned. Maness v. Meyers, 419 U.S. 449, 473 (1975) (White, J. concurring); Malloy v. Hogan, 378 U.S. 1, 12 (1964) (potential witnesses); Rhode Island v. Innis, 446 U.S. 291, 301 n.5 (1980)

(exculpatory information). The privilege requires "the government 'to shoulder the entire load'" of proving guilt. Miranda v. Arizona, 384 U.S. 435, 460 (1966). Montana's discovery rules, under the facts of this case, require each defendant who desires to rebut the state's charges to share that load. Changes in criminal discovery rules have therefore brought us to an historic juncture. Shall the current interest in an efficient trial overrule the privilege against self incrimination? This court should accept jurisdiction to answer this question.

Montana Code Ann. § 46-15-323(6)

(1987)[2] authorizes the district court to order the accused to deliver materials or communicate information to the prosecution. The fourth amendment commands that warrants (or other documents authorizing seizure) may be issued only particularly describing the things to be seized. "[This] statute lacks this particularization." Berger v. New York, 388 U.S. 41, 55 (1967). This statute requires only showings of (1) substantial need; (2) undue hardship; and (3) no violation of the accused's constitutional

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[2] "Upon motion of the prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise provided for, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the accused's constitutional rights, the court in its discretion may order any person to make such material or information available to him. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive." Mont. Code Ann. §46-15-323(6) (1987).

rights. This is the only statutory provision (aside from Montana's search and seizure provisions) which authorizes the prosecutor to obtain material from the accused.

The prosecutor applied for an order directing Carkulis to make available "all papers, documents, photographs and other tangible objects which the defendant will use at trial." App., p. 82a. This is the language of the statute. The district court ordered disclosure in the same language: "all papers, documents, photographs and other tangible objects which the defendant knows in good faith will be used as exhibits at trial." App. p. 59a. While this order was qualified by "good faith" and "subject to constitutional limitations," the district court's Order of April 9, 1987, (which followed Carkulis's assertions of good faith and his privilege against

self-incrimination) was unconditional: "[D]efendant shall disclose the materials set out in the December 20, 1985 order...."

Fourth amendment issues raised by the form of the prosecutor's discovery request and the breadth of the district court's order have been simmering in this Court for years. See, Fisher v. United States, 425 U.S. 391, 401 n.7 (1976) (breadth of subpoena not at issue); United States v. Doe, 465 U.S. 605, 607 n.3 (1984) (breadth of subpoena might violate 4th amendment, but not at issue); cf., Hale v. Henkel, 201 U.S. 43 (1906) (broad subpoena violated fourth amendment).

The district court's order was not issued upon a showing, under oath, of probable cause that items sought by the prosecutor existed. Cf., Carroll v. United States, 267 U.S. 132, 149 (1925). Neither was it issued upon a sworn

application "particularly describing the . . . things to be seized." Amendment IV, United States Const. (1791); Cooley, T., Constitutional Limitations 304 (1868) (Legal Classics Ed. 1987). The Montana Supreme Court circumvented these requirements of particularity by holding that the order was sufficiently limited by the description that only items which will be used at trial would be seized.

Because of the uncertainties of trial, we do not know whether, at the close of the State's case, we will use any exhibit. Cf., Brooks v. Tennessee, 406 U.S. 605, 619 (1972); Miranda v. Arizona, 384 U.S. 435, 541-42 (1966) (White, J., dissenting) (criminal trials are not sure bets). Therefore, the descriptions contained in the court's orders is not "sufficient to enable [Carkulis] to know what particular documents were required and to select them accordingly." McPhaul

v. United States, 364 U.S. 376, 382 (1960). Any document which we fail to produce, we are "precluded from offering at trial."[3]

Thus, this case presents squarely the proper form of a discovery order.

Twenty-three states have criminal discovery rules modeled after Rule 16, Fed. R. Crim. Proc. Under Rule 16 and its state counterparts, discovery of the accused's rebuttal case is conditioned upon the accused's prior waiver of his fourth and fifth amendment rights. If the accused makes a discovery request of the

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[3]As a "protection" against risk or harm, Montana's scheme directs the trial judge--who will rule on Carkulis's motion to dismiss--to review incriminating information in Carkulis's possession before disclosure is made. Mont. Code Ann. § 46-15-328 (1987). Such a review compels the accused to surrender the very protection which the privilege guarantees. See, United States v. Burr, 25 F. Cas. 38 (C.C. Va. 1807) (Marshall, C.J.); Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

prosecution, she is deemed to have waived her rights as to the scope of that request.

Recently, states have adopted rules which authorize the prosecutor to conduct unconditional, widespread discovery into an accused's rebuttal case. Twelve states have adopted schemes similar or identical to Montana's. It appears that this trend will continue.[4]

The supreme and appellate courts of numerous states have considered the constitutionality of their discovery rules. These holdings are in conflict. Compare, State v. Fendler, 127 Ariz. 464,

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[4]Traynor, R., Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228 (1964); II American Bar Association, Standards for Criminal Justice Discovery and Procedure Before Trial (2d Ed. 1980); National Judicial Conference on Standards for the Administration of Criminal Justice, Standards Relating to Discovery and Procedures Before Trial, § 3.3 (1972).

622 P.2d 23 (Ct. App. 1980), cert. denied, 452 U.S. 961 (1981) (rule requiring disclosure of defense witnesses did not violate privilege); and State ex rel Carkulis v. District Court, ___ Mont. ___, 746 P.2d 604 (1987), with, Prudhomme v. Superior Court of Los Angeles County, 2 Cal. 3d 320, 466 P.2d 673 (1970) (rule requiring disclosure of defense witnesses violated privilege); Scott v. State, 519 P.2d 774 (Alaska 1974) (same).[5] Compare, Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974) (disclosure of materials does not violate constitution), with, In Re Vanderbilt, 439 N.E. 2d 378, 453 N.Y.S. 662 (N.Y. 1982) (compelled production of materials violated privilege). But,

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[5]Both Prudhomme and Scott were decided on independent state grounds.

> "[a]s the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation...."

Counselman v. Hitchcock, 142 U.S. 547, 584-85 (1892).

This Court's broad dictum in Williams v. Florida, 399 U.S. 78, 83-84 (1970), and its reasoning have been widely criticized.[6] It has been the precedent

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[6] See, Berger, M., Taking the Fifth, 96-97 (1980); Blumenson, Constitutional Limitations on Prosecutorial Discovery, 18 Harv. C.R.-C.L.L. Rev. 122 (1983); 2 Wright & Miller, Federal Practice & Procedure, 105-06; In Re Misener, 38 Cal. 3d 543, 698 P.2d 637, 642-48 (1985); Scott, supra, at 783-85.

sustaining the validity of general discovery rules,[7] even though general discovery was not at issue in Williams.

The time is right to reexamine the dictum of Williams. Does Williams mean that an accused may be required to identify a witness who will aid the prosecution in proving its case, when the accused will not decide to call the witness until after the state rests its case-in-chief? Must Carkulis produce rebuttal evidence which will aid the prosecutor in surviving a motion to dismiss?

These questions need to be squarely addressed free of the assumption that the accused "will" offer that evidence. If the case is dismissed after the state rests, that evidence will never be used.

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[7] See, State v. Fendler, 622 P.2d 23 (Ariz. 1980) cert. denied 452 U.S. 961 (1981); State v. Nelson, 545 P.2d 36 (Wash. App. 1975).

Montana has imposed its discovery requirements in such a way as to require Appellant to participate in his own prosecution. Now, since Appellant has objected to such a procedure, he has been barred from offering any evidence at all.

CONCLUSION

For these reasons this Court should note probable jurisdiction.

Respectfully submitted,

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